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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 340

ETIENNE DUGAS,

Appellant,

versus

AMERICAN SURETY COMPANY OF NEW YORK,

Appellee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING

And

BRIEF IN SUPPORT THEREOF.

IGNATIUS E. UZZO,
Attorney for Petitioner.

JAMES J. LANDRY,
WILLIAM C. ORCHARD,
Of Counsel for Petitioner.

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

SUPREME COURT OF THE UNITED STATES

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No. 340

ETIENNE DUGAS,

Appellant,

versus

AMERICAN SURETY COMPANY OF NEW YORK,

Appellee.

PETITION FOR REHEARING.

Now comes Etienne Dugas, Appellant, in the above named and numbered cause and respectfully petitions this Honorable Court to grant a rehearing of the opinion and decree rendered in this cause on March 29, 1937, with respect represents:

Petitioner avers that this Honorable Court erred in the majority opinion hereinabove referred to in the following particulars:

(1) In holding that Dugas' judgment in the State Court was based solely on the qualifying bond whereas as a matter of law and fact, said judgment was a general judgment against all the property of the Surety Company.

(2) In holding that the appeal bond was in the nature of a security for the satisfaction of the judgment

in Dugas' suit on the qualifying bond and by failing to hold that the obligation of the appeal bond to prosecute the appeal had been breached by the filing of the interpleader suit and the abandonment of the appeal.

WHEREFORE, petitioner prays that a rehearing be granted in this cause; that the brief accompanying this application be considered as part hereof, and that the decree and judgment heretofore rendered be recalled and avoided and that there finally be judgment reversing the judgment of the Circuit Court of Appeals for the Fifth Circuit and for all necessary and appropriate orders in the premises.

I. E. UZZO,
Attorney for Petitioner.

JAMES J. LANDRY,
WILLIAM C. ORCHARD,
Of Counsel for Petitioner.

CERTIFICATE.

I certify that the above application for rehearing is in my opinion well founded in law and not filed for the purpose of delay.

I. E. UZZO,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

May It Please the Court:

I.

The judgment of Dugas in the State Court was not limited to the qualifying bond but was a general judgment against all the property of the respondent herein.

A reading of the judgment in the State Court (R. 14-15) will clearly show the generality of the judgment.

We can only again call the Court's attention to the language of the Supreme Court of Louisiana in the case of *Dugas v. New York Casualty Company, 181 Louisiana 322, 159 Southern Rep. 572*, and which holding is quoted with approval by Judge Sibley at *pages 128-129* of the record, which is as follows:

> "The United States court did not in its decree undertake to destroy or limit Dugas' right of action against New York Casualty Company as surety on the appeal bond which was given to suspend the execution and to secure the payment of the judgment rendered by the District Court for the Parish of Orleans. We must bear in mind that this suit is not founded on the qualifying bond of $20,000 which the American Surety Company signed as surety for Lumbermen's Reciprocal Association, but is founded upon the suspensive appeal bond for $10,000 which the New York Casualty Company signed as surety for the American Surety Company. The $20,000 qualifying bond passed out of the case when the American Surety Company abandoned its appeal in that suit on that bond, and thereby rendered the

> New York Casualty Company liable as surety on the $10,000 appeal bond" - - - "It is true that if the New York Casualty Company has to pay, and if the American Surety Company has to reimburse the New York Casualty Company, the American Surety Company will have paid out more than the amount of the $20,000 qualifying bond. But that happened in Mrs. Brim's case and in the Lyon Lumber Company case, (American Surety Co. v. Brim, et al., 176 La. 867, 147 So. 18), as a consequence of the failure of the American Surety Company to provoke an interpleader suit until plaintiff in each of those cases had obtained a final judgment against the American Surety Company (on suspensive appeal); and by the same token it may happen in this case."

We respectfully submit as authority that the judgment of Dugas in the State Court was a general and not a limited judgment, the following excerpts from the opinion of the Supreme Court of Louisiana in *Dugas v. New York Casualty Company, supra*, R. 61:

> "It is agreed by counsel for the New York Casualty Company that the American Surety Company did not abandon its appeal, but, on the contrary, satisfied the judgment appealed from, by depositing in the United States District Court, the amount of the $20,000 bond on which the suit was founded. That would be true, perhaps, if the judgment which Dugas had obtained against the American Surety Company had been limited in its terms so that he could collect only a proportionate share of the amount of the $20,000 bond on which the suit was brought. *But the judgment which Dugas held against the Ameriman Surety Company was unqualified in that respect, and was exigible against any property belonging to the company.*"

Also an excerpt from the dissenting opinion of Judge Sibley at pages 129-130 of the record:

> "Had American Surety Company, when Dugas obtained judgment against it, at once filed its interpleader, all its obligations to Dugas would have ended. But it saw fit to appeal, and to arrest execution of the *general judgment against it* by giving another obligation for its payment. - - - "

II.

The Court erred in failing to hold that the filing of the interpleader suit was an abandonment by respondent of its appeal and a breach of the terms and conditions of the appeal bond which rendered the surety liable.

The Court in the majority opinion held "The appeal bond was in the nature of a security for the satisfaction of the judgment in Dugas' suit on the qualifying bond.

From the above holding it is clearly seen that the Court overlooked the other and principal condition of the appeal bond, namely:

"That the appellant shall prosecute his appeal."

The statute setting forth the terms and conditions of the bond is *Article 579 of the Code of Practice of Louisiana*, which reads:

> "In the appeal bond it must set forth in substance, that it is given as surety *that the appellant shall prosecute his appeal*, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in

his appeal, otherwise that the surety shall be liable in his place."

This statute is written into every suspensive appeal bond executed in the Courts of Louisiana. Let us see if respondent and its surety on its appeal bond, executed to prevent the seizure of all its property, complied with the terms and conditions of their statutory appeal bond. Before the hearing on the appeal by the State Court of Appeals, respondent filed his interpleader suit in the Federal District Court. Its surety on the appeal bond was not a party to that proceeding or to any proceeding in the Federal Court. Dugas was ordered to set up his claim against the qualifying bond, but did not in any way seek to establish his rights under the appeal bond as the New York Casualty Company, surety thereon, was not a party to the interpleader proceedings.

After the conclusion of the original interpleader suit, petitioner brought suit against New York Casualty Company as surety on the appeal bond on the ground *that the filing of the interpleader suit was an abandonment by respondent of its appeal and a breach of the terms and conditions of the appeal bond which rendered the surety liable. This contention was approved in this very case by the Louisiana Supreme Court in Dugas v. New York Casualty Company, 181 Louisiana 322, 159 Southern 572, and in record herein at pages 59, 60, 61.*

This decision interpreting the statute relating to appeal bonds and the breach of their terms and conditions

by the Louisiana Supreme Court settles the question for the Federal Courts.

In that case in an exhaustive and able opinion the Louisiana Supreme Court held in part:

> "The conditions of the appeal bond on which this suit is founded are precisely in accord with the terms prescribed in article 579 of the Code of Practice, viz: 'That it is given as surety *that the appellant shall prosecute his appeal*, and that he shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal, if he be cast in his appeal, otherwise that the surety shall be liable in his place.' *The first obligation on the part of an appellant, in order to save the surety from liability on the appeal bond, is 'that the appellant shall prosecute his appeal'.* If he prosecutes his appeal, he must also 'satisfy whatever judgment may be rendered against him, * * * otherwise the surety shall be liable in his place'. But the appellant may render the surety liable as well by abandoning his appeal, as by prosecuting the appeal and then failing to satisfy whatever judgment may be rendered against him. It was so decided in Champonier v. Washington, 2 La. Ann. 1013. In that case the appeal was declared abandoned by the failure of the appellant to file the transcript before the expiration of the return day. See Champonier v. Washington, 2 La. Ann. 722. The plaintiff then proceeded against the surety on the appeal bond, and he pleaded that the plaintiff had no right to proceed against him 'because the judgment against Washington, from which the appeal was taken, was not affirmed by this (the Supreme) Court'. The Court held that, as the appellant had not prosecuted his appeal, but had abandoned it, the obligation for which the surety was liable on the appeal bonds was

to pay the judgment appealed from. In so deciding the Court said:

> 'Where an appellant abandons his appeal, the surety on the appeal bond cannot exempt himself from responsibility on the ground that "the judgment appealed from has not been affirmed", as contemplated by sec. 20 of the stat. of 20 March, 1839, and arts. 575, 596, of the Code of Practice. Percuriam: The condition of the appeal bond, following literally the requisition of art. 579 of the Code of Practice, was "that the appellant shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him", &c. The appellant did not prosecute his appeal, and the condition of the bond was thus broken.'

That decision was cited with approval in Moore, Janny & Hyams v. Lalaurie, 27 La. Ann. 1013, and in Rowle v. Feltus, 33 La. Ann. 422, and in Russ & Hollingsworth v. Their Creditors, 45 La. Ann. 422, 12 So. 627; in which cases it was held that an appeal bond which did not contain the obligation or condition that the appellant should prosecute his appeal was not a valid appeal bond. To the same effect see the editorial note to Woodle v. Settlemeyer, L. R. A. 1915 A, p. 845, III, and Ann. Cas. 1916, p. 1228.

The American Surety Company in this instance, *abandoned the appeal which the company had taken from the judgment of the Civil District Court to the Court of Appeal for the Parish of Orleans, when the Company went into the United States District Court and enjoined Dugas from prosecuting his suit, then pending in the Court of Appeal.* It is argued by counsel for the New York Casualty Company that the American Surety Company did not abandon its appeal, but, on the contrary, satisfied the judgment appealed from, by depositing in the United States District Court the amount of the $20,000 bond on which the suit was

> founded. That would be true, perhaps, if the judgment which Dugas had obtained against the American Surety Company had been limited in its terms so that he could collect only a proportionate share of the amount of the $20,000 bond on which the suit was brought. But the judgment which Dugas held against the American Surety Company was unqualified in that respect, and was exigible against any property belonging to the company. The judgment was a final judgment, not subject to annulment or amendment except by the Court having appellate jurisdiction. Code of Prac. Arts. 539, 565. And the execution or collection of the judgment was prevented only by the suspensive appeal, and on the condition that the appellant, American Surety Company, should prosecute the appeal, and should satisfy whatever judgment might have been rendered against the company, or that the surety on the appeal bond, the New York Casualty Company, should be liable in its place. The expression in the article of the code, 'that the surety shall be liable in his place', means that the surety shall be liable for whatever judgment the principal on the bond shall be liable for; that is, the judgment of the appellate Court if the appellant prosecutes his appeal, or the judgment appealed from if the appellant *abandons* the appeal. Any other interpretation would render a suspensive appeal bond worthless in the case of an abandonment of an appeal from a money judgment. *And any other interpretation would contradict* the very language of the bond, 'that the appellant shall prosecute his appeal.'"

The New York Casualty Company's obligation under the bond, according to the decision of the Louisiana Supreme Court, was to see that the American Surety Company prosecuted the appeal in accordance with the statutory terms and conditions of the appeal bond or to pay the amount of

the judgment in its place. It was a separate and distinct undertaking from that of the American Surety Company in favor of petitioner. Can courts of equity grant a release from the plain and positive terms of a contract not charged to have been entered into by fraud or violence? And without all of the parties to that contract being made parties to such action? Will they release a party from a solemn and sacred bond whose statutory terms and conditions were well known to the surety and principal thereon and which bond was executed freely and knowingly by the parties thereto in favor of the petitioner, and which bond is the sole and only law between them without reference to any other bond or bonds?

When the American Surety Company induced the New York Casualty Company to sign as its surety on the appeal bond, it did so with full knowledge of the statutory law of the State and of the effect and purpose of the contract. The appeal bond was voluntary as to the American Surety Company and the New York Casualty Company, but was forced so far as Dugas was concerned, because, whilst the American Surety Company before filing that bond could have either stayed the judgment by paying, or have its interpleader proceeding or have permitted Dugas to levy execution. It chose to prosecute an appeal and by filing of the motion and the bond, which is the subject of this litigation, it chose that course, and when it did, Dugas was forced to accept because he could do nothing except to question the validity of the bond in the proceedings for appeal thereafter.

We again conclude with the correct summary of the entire case given by Judge Sibley in his dissenting opinion at *pages 129-130* of the Record:

> "Had American Surety Company when Dugas obtained judgment against it at once filed its interpleader, all its obligations to Dugas would have been ended. But it saw fit to appeal, and to arrest execution of the general judgment against it by giving another obligation for its payment. The consideration of the appeal bond was the delay to be obtained. That consideration was enjoyed, and the bond as a collateral obligation stands good according to its terms. According to those terms the bond has been breached, and the liability on it has become absolute."

We respectfully submit, therefore, that the majority opinion of this Court is erroneous and should be recalled and avoided and that the decree and judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

I. E. UZZO,
Attorney for Petitioner.

JAMES J. LANDRY,
WILLIAM C. ORCHARD,
Of Counsel for Petitioner.